THE PHILIPPINE INDIGENOUS PEOPLES' STRUGGLE FOR LAND AND LIFE: CHALLENGING LEGAL TEXTS

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I. INTRODUCTION

Numerous issues and concerns of indigenous peoples have witnessed significant breakthroughs both locally and internationally in recent decades. Various means of struggle both within and without the formal legal system have been employed. Defending ancestral lands and their resources remains the major issue. Implicit in this battle to protect land and resources is the struggle to preserve indigenous culture and traditions that are so often inextricably linked to the land itself.

It is against this background that this article documents and reviews customary practices and land concepts in the Philippines and examines the interface between state laws and custom laws on land within the context of the conflicts over indigenous peoples' lands. The article employs case studies to discuss the application of state laws to indigenous peoples' communities and the interaction of the formal legal system the state laws represent with the customs and traditions the indigenous peoples have historically relied upon to dictate the rules regulating the use and alienability of land. Particular attention will be devoted to the Cordillera experience in order to illustrate how community-level efforts to defend indigenous territories can operate either as a mechanism for reform within the state's existing formal legal framework or as a means of challenging current legal texts and principles at their foundation. This approach is very much in line with the country's efforts at "reforming the judiciary" as expressed in the Philippine Judiciary's "Blueprint of Action," where it called for a "review of existing laws."[1]

II. OVERVIEW OF PHILIPPINE INDIGENOUS PEOPLES

This section presents a brief and updated overview of indigenous peoples in the Philippines with a focus on the issues and trends affecting them. There is no unanimity regarding the standards to be used in defining indigenous peoples. Some authorities are in favor of a linguistic criterion and others of a cultural definition; others prefer that of a group consciousness; still others suggest a functional criterion; and some a combination of two or more of the above, together with one based on physical characteristics.

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1. SUPREME COURT OF THE PHILIPPINES. THE BLUEPRINT OF ACTION: ITS PARAMETERS AND STRATEGIC COURSES OF ACTION (1999) (Blueprint of Action for the Judiciary).

To illustrate the complex problem of defining "indigenous peoples," several recent definitions are provided. The Indigenous Peoples' Rights Act (IPRA), or Republic Act No. 8371 of the Philippines, defines Indigenous Peoples as follows:

> Indigenous Peoples/Indigenous Cultural Communities (IP/ICC) refer to a group of people sharing common bonds of language, customs, traditions and other distinctive cultural traits, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized a territory. These terms shall likewise or in alternative refer to homogenous societies identified by self-ascription and ascription by others, who have continuously lived as a community on community-bounded and defined territory, sharing common bonds of language, customs, traditions and other distinctive cultural traits, and who have, through resistance to political, social and cultural inroads of colonization, become historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of descent from the populations which inhabited the country at the time of conquest or colonization or the establishment of present state boundaries and who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains.[2]

The U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities (1971) relies on the following definition:

> Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed in their territories, considered themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity,

2. The Indigenous Peoples' Rights Act, RA No. 8371 (1997). "An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, creating a National Commission of Indigenous Peoples, establishing implementing mechanisms, appropriating funds therefore and for other purposes. " *Id.*

> as the basis for their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems.[3]

The International Labor Organization (ILO) (1996) uses a purely empirical guide to identifying indigenous groups:

> Indigenous people are descendants of the aboriginal population living in a given country at the time of settlement or conquest by some of the ancestors of the non-indigenous groups in whose hands political and economic power at present lies. In general, those descendants tend to live more in conformity with the social, economic and cultural institutions which existed before colonization or conquest than with the culture of the nation to which they belong; they do not fully share in national economy and culture owing to barriers of language, customs, creed, prejudice, and often to an out-of-date and unjust system of worker-employer relationships and other social and political factors.[4]

This article will use the definition from the IPRA law. In the Philippines, these groups have been referred to, through the years mainly by the government, as indigenous cultural communities, cultural minorities, tribal Filipinos, ethnic minorities, and highlanders. The United Nations popularized the use of the term "indigenous people," especially after the declaration of 1993 as the Year of the Indigenous People. There have been objections to the use of the term "indigenous people," considering that one can also refer to *Ilocanos, Tagalogs, Cebuanos*, and other lowland communities as indigenous peoples.[5] But in the absence of a term without objections, I will use the term "indigenous peoples" throughout this article.

A. A General Profile of Indigenous Peoples in the Philippines

The Philippines is composed of 7,107 islands and islets spanning 1,854 kilometers from north to south and stretches from China in the north to the Indonesian archipelago in the south. It is an archipelago endowed with abundant natural resources, a rich history, diverse cultures, and many ethno-linguistic groups. The Philippines is the only country in Asia that has officially used the

3. *See* KARL M. GASPAR, THE LUMAD'S STRUGGLE IN THE FACE OF GLOBALIZATION 99 (2000).

4. CAROLYN MERCADO, LEGAL RESEARCH ON LAWS & JURISPRUDENCE PERTAINING TO PHILIPPINE INDIGENOUS PEOPLES (World Bank Report 1998).

5. GASPAR, *supra* note 3, at 145.

term "indigenous peoples."[6] Of the more than 75 million Filipinos, about 12 to 15 million are indigenous peoples, or about 17-22% of the total population in 1995.[7]

The population data regarding the indigenous peoples in the country vary according to who has conducted the research. The Episcopal Commission on Tribal Filipinos (ECTF) distinguishes approximately 40 ethno-linguistic groups with a population of about 6.5 to 7.5 million (10-11% of the country's population in 1995). The National Council of Churches in the Philippines (NCCP) estimates some 60 such groups. The National Commission on Indigenous Peoples (NCIP) identifies 95 distinct tribes, which includes the Islamic or Muslim groups, in 14 regions of the country with an estimated population between 12-15 million members (17-22% of the total population in 1995).[8] But the detailed report and breakdown of this figure is not available from the NCIP office.

Indigenous peoples' communities can be found in the interiors of Luzon, Mindanao, and some islands of Visayas. They either withdrew to the hinterlands in the face of colonization or they stood their ground successfully and have maintained a close link to their ancestral past. These communities comprise a diverse collection of more than forty ethno-linguistic groups, each with a distinct language and culture.[9]

The indigenous peoples in the Philippines continued to live in their relatively isolated, self-sufficient communities, at the time when most lowland communities had already been integrated into a single colony under Spain in the 1700s and 1800s. They were able to preserve the culture and traditions of their "ethnos" or "tribe" as reflected in their communal views on land, their cooperative work exchanges, their communal rituals, their songs, dances, and folklore. Instead of hierarchical governments, each of these communities had its own council of elders who customarily settled clan or tribal wars to restore peace and unity.[10]

But with the long years of colonial rule in the Philippines, from the 1700s to the early 1900s, and the influx of migrants into indigenous peoples' territories, many influences have been introduced that gradually changed the indigenous way of life. Indigenous communities at present are still characterized by these phenomena but are definitely no longer in their pure and natural state, showing varying degrees of influence from outside culture.

During the American colonial rule from the 1890s to the early 1900s, the forces of market economy and central government slowly but steadily caught up with most indigenous communities. Lowlanders, backed by government

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6. RAYMUNDO D. ROVILLOS & DAISY MORALES, INDIGENOUS PEOPLES, ETHNIC MINORITIES AND POVERTY REDUCTION. Final Report, ADB RETA No. 5953 (2001).

7. Tunay na Alyansa ng Bayan Alay sa Katutubo (TABAK) is a national alliance of advocates or supporters of indigenous peoples in the Philippines. TABAK published a book: TABAK, STRUGGLE AGAINST DEVELOPMENT AGGRESSION (TRIBAL FILIPINOS AND ANCESTRAL DOMAIN) (1990).

8. *Id*.

9. *Id*.

10. *Id*.

legislation, seized communal lands, and eroded local self-sufficiency in the process. Lowlanders also brought in a barrage of Western cultural influences that undermined tribal ways of life to varying degrees.

In the 1970s pressure upon indigenous communities' land base intensified as the national economy became increasingly foreign-dominated and export-oriented. Because they occupy areas rich in natural resources, indigenous communities have been besieged by a growing number of foreign and local corporations engaged in mining, logging, plantations, and other export industries. To support these industries, past and present governments have constructed massive dams and other foreign-funded infrastructure projects that have continually diminished the extent of indigenous peoples' ancestral domain.

The military has also participated in this onslaught against indigenous communities. It has forcibly relocated tens of thousands of indigenous peoples, comprising entire indigenous communities, in an attempt to counteract the growing resistance in the upland areas. These attacks on indigenous peoples are directed against their ancestral lands.

Depriving indigenous peoples of their ancestral lands will mean the complete loss of their identity as distinct peoples. Thus, no less than the question of survival is now at stake for the indigenous peoples in the Philippines. The remaining links with their ancestral past are being destroyed forever.

B. Major Groups of Indigenous Peoples

According to *Tunay na Alyansa ng Bayan Alay sa Katutubo* TABAK,[11] there are more than forty ethnic groups that comprise the Philippine indigenous population, and these can be classified into six groupings excluding the Islamic groups. The NCIP, on the other hand, identifies ninety-five distinct tribes of indigenous peoples in fourteen regions of the country and includes the Islamic groups. The data of KAMP include forty ethno-linguistic groups and three major groups of Islamic or Muslim Filipinos, and these tribes may be roughly classified into seven groupings:

> (1) *Mindanao Lumad*: This is a generic term embracing all non-Muslim hill tribes of Mindanao. *Lumad* is a Visayan term that means "born and grown in the place". The *Lumad* peoples are composed of some eighteen ethnic groups and they form the largest grouping of indigenous peoples in the country. They have a total population today of 2.1 million and are concentrated in varying degrees in the hilly portions of the provinces of Davao, Bukidnon, Agusan, Surigao, Zamboanga, Misamis, and Cotabato. They can be found in almost all provinces of Mindanao and they include

11. *Id*.

the *Subanen, Manobo, B'laan, T'boli, Mandaya, Mansaka, Tiruray, Higaonon, Bagobo, Bukidnon, Tagkaolo, Banwaon, Dibabawon, Talaandig, Mamanua,* and *Manguangan*.

(2) *Cordillera Peoples*: This is the indigenous population of the Cordillera mountain range, which covers six provinces in the middle of Northern Luzon – Abra, Apayao, Benguet, Ifugao, Kalinga, and Mountain Province. They are collectively called *Igorots*, meaning "mountain people" although some groups like the Kalingas and Ifugaos refuse to be called *Igorots* except by their own tribes. There are eight ethno-linguistic groups in the Cordillera, namely, *Bontoc, Ibaloi, Ifugao, Isneg, Kalinga, Kankanaey, Tingguian*, and *Yapayao*, numbering a total of 988,000.[12]

(3) *Caraballo Tribes*: These are the five ethno-linguistic groups – *Ibanag, Ilongot, Gaddang, Ikalahan* and *Isinai* – who together with the *Agta* peoples inhabit the Caraballo mountain range in Eastern Central Luzon. This range connects the provinces of Nueva Vizcaya, Quirino and Nueva Ecija. The Caraballo tribes number roughly 500,000.

(4) *Agta and Aeta/Negrito*: These short, dark-skinned and kinky-haired peoples are considered the earliest inhabitants of the Philippines. Aside from having been perpetually pushed into the hinterlands of Central Luzon, mainly in the provinces of Zambales, Bataan and Pampanga, and in other parts of the country, they also suffer from racial discrimination. With a population of about 160,000, they are the most widely distributed among indigenous peoples.

(5) *Mangyan of Mindoro*: This is a generic name for the six ethno-linguistic groups spread over the mountains and foothills of Mindoro, an island southwest of Luzon, namely, *Batangan, Iraya, Hanunoo, Alangan, Ratagnon, Buhid*, and *Tadyawan*. They are described as the first inhabitants of the island, and until today, they are one of the few groups that still practice a pre-Spanish form of writing. Their present population is about 150,000.

(6) *Palawan hill tribes*: These are the non-Muslim tribal people of Palawan island located further west of Mindoro. This group is composed of four ethnic groups – *Tagbanua, Batak, Kalamianes,Cuyonin*, and *Ken-uy*, and they number at least 120,000.

(7) *Muslim Groups*: These are the Muslims in Mindanao composed of fourteen groups, namely, Maranao,

12. CORDILLERA PEOPLES ALLIANCE. REGIONAL SITUATIONER (undated photocopy).

> Maguindanao, Tausug, Samal, Yakan, Sangil, Palawani, Badjao, Kalibugan, Jama-Mapun, Ipanun, Kalagan, Molbog, and Muslim.

The population data of the ONCC and OSCC have more identified ethnic groups than the data from the NSO. These could be new groups while others are simply subsets of larger tribes.

III. INDIGENOUS PEOPLES' VIEWS ON LAND USE, OWNERSHIP, AND LAND CONTROL

There is a general consensus that the distinct characteristics of the indigenous peoples are: (1) the conservation (to some extent) of their vernacular languages, traditional socio-economic institutions, and cultural and religious practices; (2) self-identification as distinct societies; (3) subsistence-oriented economies; and (4) a special relationship with their ancestral lands. The last two characteristics are crucial because they define the struggle of the indigenous peoples for self-determination.[13] What essentially distinguishes the indigenous peoples from the rest of the population is their concept of land as granted and entrusted by one Creator for everyone to harness, cultivate, sustain, and live on. This land concept has become distinct because it adheres to the spirit of collectivism and rejects the idea of private property.[14]

Land is a central issue to indigenous peoples because it defines their very existence. Because of this, the similarities and differences of their concept and world view of land and the conflict arising from it will be discussed extensively to show the significance of land and its complexities to the indigenous peoples.

Since time immemorial, Philippine ancestors believed in a cosmology where the Creator (known by various names such as *Bathala, Kabunian, Magbabaya, Apo Sandawa*) was linked with other deities and spirits. In Philippine origin myths the land and everything connected to it were created by this deity. Because land was of divine origin, it was sacred. Being sacred, it was not subject to ownership, sale, purchase, or lease.[15]

Among indigenous peoples in the Philippines, there was a widespread belief that land was held usufruct; it could not be removed from the community's use. The interaction of the ancestors with the land varied according to how they produced what they needed for food. When they were nomadic and sea-foragers, they shifted their habitation from place to place and gathered whatever food they could from the land and the waters. When they settled into a life of sedentary

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13. JOJO GUAN & ROS B. GUZMAN, IPRA: LEGALIZING DISPOSSESSION? IBON Special Release 42 (1999).
14. *Id*.
15. *See* GASPAR, *supra* note 3, at 120.

agriculture, they established a system of communal ownership.[16] The indigenous peoples still possess this belief in the sanctity of the land, especially when confronted with the threat of losing control over their homeland.

A. The Concept of Land Among the Cordillera Peoples

1. The Cordillera

The Cordillera, a mountain range comprising one-sixth of the total land area of Luzon Island, is home to around 1.2 million indigenous peoples collectively known as *Igorots*. The *Igorots* include a number of ethno-linguistic groups, among the major groups of which are the *Bontok, Kankanaey, Ibaloy, Kalinga, Tinggiuan,* and *Isneg*. Like other indigenous territories, the Cordillera is rich in natural resources but its indigenous peoples remain poor.

Over the past decades, the Cordillera has been a major recipient of development projects, many of these funded by foreigners. But these projects have brought an aggressive philosophy of development characterized largely by displacement of peoples and treatment of Cordillera as a mere "resource base." In the 1970s the Cordillera indigenous peoples widely rejected a World Bank-funded series of dams along the Chico River that would have displaced 90,000 *Bontok* and *Kalinga* people. Earlier in the 1950s the construction of the Ambuklao and Binga dams in the province of Benguet had already dislocated hundreds of indigenous *Ibaloy* families, who up to the present have never been properly compensated. But there have been new commitments to indigenous peoples both at the national and international level.

The discourse in land and resources among the Cordillera peoples can only be understood within the context of their beliefs and day-to-day practices.

> [T]o claim a place is the birthright of every man. The lowly animals claim their place, how much more man. Man is born to live. Apu Kabunian, lord of us all, gave us life and placed us in this world to live human lives. And where shall we obtain life? From the land. To work the land is an obligation, not merely a right. In tilling the land you possess it. And so land is a grace that must be nurtured. Land is sacred. Land is beloved. From its womb springs our Kalinga life.[17]

These were the words of a Kalinga warrior chief, Macliing Dulag, explicitly

16. *Id*.

17. Mariflor Parpan-Pagusara, *The Kalinga Ili: Cultural-Ecological Reflections on Indigenous Theoria and Praxis of Man-Nature Relationship*, *in* DAKAMI YA NAN DAGAMI: PAPERS AND PROCEEDINGS OF THE FIRST CORDILLERA MULTI-SECTORAL LAND CONGRESS (Cordillera Consultative Committee eds., 1983).

describing the Cordillera peoples' concept of land. Like most indigenous peoples worldwide, the Cordillera peoples equate land with life, both of which are given by the Creator (personified in the local context as *Kabunian, Lumauig, Umay-ayong, Mah-nongan*, or *Wigan* for the *Ifugaos).* Land in this sense includes all the resources below and above the earth surface.

2. Territoriality

The plurality among the Cordillera peoples can be gleaned not only from cultural variations, but is also explicitly indicated by each community's claim to a territory. The *ili* is the local concept of people and territory among the Cordillera peoples which may be defined as "the communal territory of an indigenous settlement," similar to the concept of homelands among tribal peoples. Prior occupation, use, and development of the land is the basis for defining the boundaries between *ilis*. Territorial boundaries (*beddeng* in Mt. Province, *bugis* in peace pact forging areas) have been established between *ilis* and recorded in collective memories of the people. Boundary markers are usually the natural geophysical features like mountain ridges and water bodies.[18]

3. Rights to Access and Use

There are three prevailing land and resource access and use patterns in the Cordillera. These are the communal, the clan or family properties, and the individual private properties.

> *Communal properties*: These refer to the land and resources commonly owned by the tribe or *ili*. Communal properties usually include the forests and hunting grounds, water bodies (even if located upon individual private lands), ritual and sacred grounds, and mineral lands. Although use and access to resources in these types of land are open to all members of the *ili*, custom law frowns upon the abuse of these rights. People traditionally partake of the resources as needed and are all equally responsible for its regeneration.
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> *Clan properties*: These include *uma* (swidden farms), pasturelands and reforested areas (*muyung* in Ifugao, *batangan* and *tayan* in Mt. Province, etc) acquired from the common properties through prior occupation and usufruct rights.
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> *Individual private properties*: These include the rice fields (*payew*), home lots and backyard gardens. Private properties may be bequeathed to individual family members.

18. Joanna Carino, *Ancestral Land in the Cordillera*, 2 PANTATAVALAN (1998).

> The nearest kin are given priority when these properties are sold or mortgaged.[19]

4. Land Acquisition

In the past, no member of an *ili* was without a piece of land to till. Land and property within the *ili*, especially individual private property was acquired primarily through inheritance. Other modes of acquisition were sale, barter or compensation.

> *Inheritance*: Inherited properties are the most prized possessions among the Cordillera peoples. These are usually the individual and privately held lands like rice fields and residential lots. Rights to communal and clan lands are similarly inherited but ownership remains with the clan (*dap-ay*).
>
> *Sale*: This is usually a last resort among the Cordillera peoples. Sale is traditionally permitted only in times of extreme need and emergency. Only individual private properties can be sold. Priority is given to the immediate family members when properties are offered for sale.
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> *Compensation*: Property may also be acquired as a form of compensation for harm or damage done to another member of the community. Among the peace pact holding areas, these properties may not necessarily be given to the directly aggrieved party but to the community as a whole.[20]

5. Indigenous Governance

Custom law, which, in the past, was consciously inculcated among the youth, pervades the day-to-day dynamics in a Cordillera *ili*. It is intricately woven into the value and belief system. A rich repository of custom law, which is traditionally oral, is found in the various indigenous socio-political and justice systems.

> *Bodong/Pechen*: This term literally means peace pact. Among the warring groups in the Cordillera like the *Kalinga*

19. *Id*.

20. Jill Prill-Brett, *Stone Walls and Waterfalls: Irrigation and Ritual Regulation in the Central Cordillera, Northern Philippines*, *in* CULTURAL VALUES AND HUMAN ECOLOGY IN SOUTHEAST ASIA: PAPERS ON SOUTH AND SOUTHEAST ASIAN STUDIES (Karl L. Hutterer, A. Terry Rambo & George Lovelace eds., 1985).

and some groups in Bontoc and Ifugao, the *bodong* is the basic institution by which life, territory and integrity are protected.[21]

Dap-ay/Abong: This refers to the physical location of the center of governance in the *ili* which also serves a social function. It is here where the council of elders usually meets and community matters and affairs are decided.

Lallakay/Amam-a: This is the traditional council of elders who govern the *ili*. Membership on the council is not only based on age but also on elders' wisdom as a function of their accumulated experiences.

6. Resource Management

The concept of sustainable development is not new to the Cordillera peoples. It is a principle that their ancestors inculcated in them. The present abundance of mineral and water resources as well as the biodiversity in the region in spite of the plunder done by mining companies, the timber industry, and urbanization testifies to the peoples' past commitment to sustainable development. Among these indigenous systems of resource management are the *Ifugao muyung*, the *Bontoc tayan*, and the *Tinggiuan's lapat* systems.

a. Forest/Watershed Areas

Muyung refers to privately held woodlots among the Ifugao's Tuali subgroup. The privatization of the woodlots ensures that forested areas are maintained not only for fuel wood and timber but also, and, most importantly, for the agricultural economy. Management includes the obliged *hikwat* or clearing the *muyung* of undergrowth and creepers, as protection from encroachment and abuse of resources therein. Among the *Ayangan* subgroup, this is called the *pinugo*. *Batangan/Lakon/Saguday* are the woodlots under ownership of a clan, family or the *dap-ay* in western Mountain Province.

Tayan refers to the corporate property among the *Bontok Kankanaeys*. It consists of forested lots managed and exclusively used by a clan, specifically a bilateral descent group.[22]

Lapat is the indigenous resource management system among the *Tinggian* in Abra and the *Isneg* of Apayao. The system is closely associated with death rituals where a family can designate a specific area under *lapat*. The *lapat* is the custom of declaring a specific area (i.e., river, creek, portion of the forest, etc.)

21. June Prill-Brett, *Bontoc Concepts of Property as a Product of their SocioEconomical Systems*, *in* DAKAMI YA NAN DAGAMI: PAPERS AND PROCEEDINGS OF THE FIRST CORDILLERA MULTI-SECTORAL LAND CONGRESS (Cordillera Consultative Committee eds., 1983).

22. *Id*.

closed from human activities and exploitation for one to two years. Violation is punished under customary law. The underlying purpose of the *lapat* is to ensure the regeneration of the biodiversity of resources within the declared area.

b. Agricultural Land

Agriculture has always been the main livelihood of the Cordillera peoples, with rice and *camote* (sweet potato) the main staples grown. The skills and knowledge the peoples developed through the ages facilitated their efficient adaptation to their mountain homelands. Many of these adaptations include traditional agricultural systems and practices that still exist, if somewhat improved upon, today. A very important aspect of the agricultural practices of the *Igorots* is their intricate relationship with the peoples' belief system. Among all *Igorot* communities, agriculture, especially rice production, is the focus of most religious rituals.

Fallowing and organic farming are two of the most distinctive features of agriculture among the Cordillera peoples. Fallowing allows the regeneration of soil nutrients lost during its use for food production. A fallow period, varying from one to five years, is observed by all the Cordillera peoples in *kaingin* (swidden) agriculture. The Cordillera peoples practice organic farming in both the *uma* (swidden farms) and the rice fields. Organic farming includes the techniques we refer to today as multiple cropping, composting, and integrated pest management.

c. Water Resources

Dapat and *Mananum* technically refer to the traditional irrigators' associations that have recognized rights and access to a water resource. Brett traces membership to a *dapat* in Tukukan, Bontoc back seven generations. Conceptually, the *dapat* and *mananum* are traditional systems of water resource management that ensure a reliable water supply through cooperative rehabilitation, quality and quantity maintenance, and above all, respect for life.

Customary law dictates the need to regenerate aquatic resources; this necessarily imposes a mandate to sustain the quality and quantity of water. Potable water sources are specifically maintained as such by observing pollution prevention regulations. Regulations on fishing and other aquatic biodiversity are similarly imposed by the *dap-ay* or *abong.*

d. Water Resource Management in Besao

E. Dictaan-Bang-oa presented a paper entitled "Traditional Water Management in Besao, Mt. Province" during the World Water Forum in Kyoto, Japan in March 2003.

The issue of water among the *iBesao (people from Besao)* is an issue of survival for a people who consider themselves the stewards of the land. Among the *iBesao*, traditional management of water resources is intricately woven in the belief of spirits inhabiting elements of nature, *nakinba-ey*, and the morality embodied in the *inayan* that governs the peoples' day-to-day behavior. The spirits or supernatural beings inhabiting water sources are believed to be the primary forces in the production, and thus, supply of water. It is therefore necessary for the people not to displease the spirits otherwise they will stop the flow or production of water. Among the culturally prescribed taboos or *inayan* in relation to water sources and the *nakinba-ey* is the prohibition against grazing or butchering animals near water sources. Animal wastes are believed to repulse the *nakinba-ey.* Another is the avoidance of carrying human or animal corpses along a path near a water source as this displeases the *nakinbaey. Inayan*, literally, is sort of a warning equivalent to the English "Be careful!" which, in Besao, is replete with the moral responsibility to consider the effects of one's actions on other people.

Water is a resource that cannot be owned by any private individual even if it is found in privately held property. The landowner can only be accorded the right to prior use. Rights to water according to customary law belong to those who first tapped the source for their use but does not include a right to divert water from its natural flow and depriving those who claim 'natural rights' by virtue of being located along the natural course of the water. In agricultural areas, the *dumapat* system is still being practiced today. The *dumapats* are groups of rice field owners sharing a common water source for their irrigation use. Aside from these, *dumapats*, today's equivalent of formal irrigators' association, claim their right to a water source based on prior claim and natural flow. Water sources found in privately held lands for example Kapusean in Suquib, Besao, cannot be privatized. The landowner may have prior right to use the water but not to stop or divert it from its natural flow.

Maintaining water supply involves *dumapat* cooperation, labor, and resources. Cleaning, weeding and rehabilitating canals and intakes to facilitate water flow are responsibilities of all members of a *dumapat*. Each member family sends a representative to offer labor in cases where major rehabilitation works are needed like the annual cleaning

during the dry season. When the water supply is depleted, especially during the dry season, the *dumapats* take turns directing the water flow to their fields as agreed among themselves and without prejudice to other fields. The process of taking turns is referred to as *banbanes* and ensures that each one gets his or her turn. Field owners keep vigil at night to make sure that their fields are watered according to schedule. Local water disputes are taken to the *dumapat* level. If not resolved at this level, they are brought to the *dap-ay*. Besao residents, however, cannot recall any major water dispute among themselves. Community rebuke and taunting are seen as enough punishment for abusive *dumapat* members.

An important aspect of the water management in Besao is sustaining the forestlands. Approximately 69% of Besao's land area is classified as forestland. This is further sub-classified into two types based on use. One is the *batangan* or the pinewood forest and the other is the *kallasan* or mossy forests. The *batangan* is generally used for fuel and timber needs while the *kallasan* serves as the hunting and gathering grounds. To sustain these, local ordinances like banning logging for commercial use, have been imposed. People are also very conscious of preventing forest fires so that even in the cleaning of the *uma*, fire lines are established before any burning is done. In cases of fire, community members voluntarily mobilize themselves to put it out and secure valuable properties like houses, rice granaries and animal pens.

Religious practices contribute to water management as well. Traditionally, the *legleg*, a sort of a thanksgiving and propitiating ritual, is performed in water sources yearly in Besao. Performance of the *legleg* is believed to please the *nakin-baey*, and prevent it from leaving. Such traditional rites reinforce the high value and regard for water, thus, maintaining its quantity and quality through culturally prescribed and environmentally sustainable use as well as reaffirming man's relationship with nature.

IV. THE PHILIPPINE STATE'S LAND POLICIES: AN HISTORICAL OVERVIEW

In many cases of indigenous peoples' struggle for autonomy or survival itself, land has been the central issue. Uprooting indigenous peoples from their land denies them their right to life and identity. They have continuously related to

and enhanced the environment they are in as the material basis of their existence. They also have been successful in creating indigenous laws prior to the coming of the colonizers or the advent of the so-called modern nation states. The existence of the indigenous peoples' prior and, hence, "vested rights" have been widely acknowledged even at the international level. In recognition of this state of affairs, modern nation states have become increasingly conscious of the importance of the land issue to indigenous populations and have worked, at least on paper, to acknowledge these rights, as the following discussion will illustrate.

The state's definition of indigenous peoples emphasizes their ties to the land they occupy. It states that "indigenous peoples refer to a group of people sharing common bonds . . . who have under claims of ownership since time immemorial occupied, possessed and utilized a territory . . . ."[23] Yet even with this apparent state recognition of indigenous peoples' rights, displacement and various forms of violations of rights have been common in indigenous peoples' territories. This present day treatment of indigenous peoples is rooted in the country's colonial history. The colonizers brought with them their own concepts of land use and ownership, which were very different from those of the natives. This section tackles, in historical perspective, the land policies of the Philippine state that infringe on indigenous lands and resources.

A. Spanish Colonial Government Land Laws

The superimposition of colonial laws started with a legal fiction – the Regalian Doctrine – that declared arrogantly that the Crown of Spain owned all lands. This would later become the "theoretical bedrock upon which Philippine land laws were based . . . ."[24] This signaled the start of the undermining of indigenous peoples' concepts of land use and land rights (It should be noted, however, that many indigenous peoples were able to retain their tribal sovereignty so that their land laws exist independent of Spanish promulgated land laws.).

Between 1523 and 1646, it is said that at least twenty-one laws related to the Philippines were enacted by Spain.[25] Royal decrees and various memoranda would later follow. The Spanish introduced laws that essentially contradicted and even denied customary concepts of land use and ownership. The royal decrees of October 15, 1754 called for titling of lands on the basis of "long and continuous possession."[26] In support of this, the Royal Cedula Circular of 1798 and the Royal Decrees of 1880 followed. By July 1893 the Spanish Mortgage Law that provided for the systematic registration of land titles and deeds was put into effect. As

23. Indigenous Peoples Rights Act, Chap. II, § 3.

24. June Prill-Brett, *Preliminary Perspectives on Local Territorial Boundaries and Resource Control*, *in* WORKING PAPER SERIES NO. 6 2 (Cordillera Studies Committee eds., 1988).

25. Owen J. Lynch, *Native Title, Private Right and Tribal Land Law: An Introductory Survey*, 57 PHILIPPINE L.J. 268, 274 (1982).

26. *Id*.

expected, many did not avail themselves of this opportunity, so in 1894 the Maura Law was issued.[27]

The Maura Law is said to be the last land law under Spain. Article 4 of the Maura Law denied and contradicted customary laws of land ownership declaring that any lands not titled in 1880 "will revert back to the state."[28] This meant that landowners were given only a year within which to secure title. After the deadline, untitled lands were deemed forfeited. The Maura Law also reiterated that "all pueblo lands were protected lands and could not be alienated because they belonged to the King."[29]

B. American Colonial Land Laws

The Regalian Doctrine (Jura Regalia or Spanish Royal Law) remained in favor throughout the American administration of the Philippines from 1898 to 1945, providing the American government, like its Spanish predecessor, legal justification for centralizing and controlling the islands' natural resources. The Regalian Doctrine, in effect, endured as land laws were passed which dispossessed the indigenous peoples of all claims to their lands. Indeed, the Treaty of Paris in 1898 expressly stated that "all immovable properties which in conformity with law, belong to the Crown of Spain" and were to be ceded and relinquished to the new colonial master.[30]

To further strengthen the colonizer's hold over the islands' resources, the Public Land Act was enacted in 1902, giving a mandate to the American government to expropriate all public lands. It subjected all lands to the Torrens system, a proof of land title, thereby leading to the commodification of land resources. The Philippine Commission Act No. 178 of 1903 followed. This ordered that all unregistered lands would become part of the public domain, and that only the State had the authority to classify or exploit the same.[31] Two years later, the Mining Law of 1905 was legislated. This gave the Americans the right to acquire public land for mining purposes and revealed the Americans' goal of extracting resources from indigenous territories. In the same year, the Land Registration Act of 1905 institutionalized the Torrens Titling system as the sole basis of land ownership in the Philippines. The Torrens System of land titling was patterned after the land registration law of the State of Massachusetts, U.S., which in turn was copied from the Australian model. (Sir Richard Torrens of South Australia originally conceived the idea of land transfer of ownership by easy alienation of land.)

Any lands not registered under the Spanish colonial government were

27. RENATO CONSTANTINO, THE PHILIPPINES: A PAST REVISITED (1998).

28. *Id.*; Lynch, *supra* note 25.

29. Onofre D. Corpuz, *An Economic History of the Philippines*, *in* INDIGENOUS PEOPLES, ETHNIC MINORITIES AND POVERTY REDUCTION (2001).

30. Lynch, *supra* note 25, at 275.

31. GASPAR, *supra* note 3.

declared public lands owned and administered by the state. By virtue of the Public Land Acts of 1913, 1919, and 1925, Mindanao and all other fertile lands that the State considered unoccupied, unreserved, or otherwise unappropriated public lands became available to homesteaders and corporations, despite the fact that there were indigenous people living on these lands.[32] Still, in 1918, the Public Land Act No. 2874 was passed providing for the claiming and registration of lands through a free patent system. This law contained the restriction that "free patents and certificates shall not include nor convey title to any metal or mineral deposits which are to remain the property of the government."[33]

In 1929, Proclamation No. 217 declared 81.8% of the total land area of the Cordillera as the Central Cordillera Forest Reserve. This rendered the indigenous peoples "'squatters in their own land'" according to formal state laws. Forest lands are inalienable and non-disposable. In 1935, the Mining Act banned indigenous mining activities; while the Commonwealth Act 137 granted timber and water rights within mining claims for the development and operation of mining explorations.[34] These land laws denied outright the existence of indigenous peoples who have controlled and managed their lands since time immemorial.

The 1935 Constitution (of the new self-governed Commonwealth of the Philippines) essentially retained the colonizers' view of land. This philosophy is embodied in § 1, Article XIII, which states:

> All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to the citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, subject to existing right, grant, lease or concession at the time of the inauguration of the Government established under the Constitution.[35]

C. Post-Colonial Land Legislation

The Philippines gained political independence from the United States in 1946; however, the postwar regime essentially upheld the policies of the American colonial government. In the Cordillera region, the land problem was

32. *Id*.

33. Anne Tauli, A Historical Background to the Land Problem in the Cordillera, Paper Presented to the First Cordillera Multi-Sectoral Land Congress (Mar. 11-14, 1983).

34. JOANNA CARINO, NATIONAL MINORITIES AND DEVELOPMENT: A CORDILLERA SITUATIONER (Cordillera Consultative Committee eds., 1984).

35. ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 493-94 (1995).

aggravated by the passage of legislation and Republic Acts and Proclamations declaring *Igorot* ancestral lands open for leaseholders, military reservations, watersheds, and resettlement areas. The Cordillera region could also be used by the government as a "resource base" for its development endeavors. This meant that the government would take a development philosophy that fully exploited the rich natural resources through extractive development projects like hydropower dams, mining and logging, with the "minorities" sacrificing for the "majority."

Among the more significant post-colonial pieces of legislation that would deprive and deny the indigenous peoples their ancestral lands and cultural heritage was the infamous Revised Forestry Code of 1975. The Code provides that all lands having a slope of eighteen degrees or more are inalienable and non-disposable for agricultural and settlement purposes. Paradoxically, the indigenous peoples have traditionally settled on the slopes in their territories and have long enjoyed sustainable agriculture there as evidenced by the antiquity of their terraces that, to this day, are thriving. The code also declared, "all lands above 18 degrees slope automatically belong to the state classified as public forest land." The Regional Forestry Master Plan[36] recorded that 57% of the pine forest area in the Cordillera has a slope greater than 50 degrees – making the people squatters in their own lands.

Prior to the Forestry Code, however, some legislation was passed that seem to have favored the lot of the indigenous peoples. Apparently, this legislation was aimed at integrating indigenous peoples into the majority society by giving indigenous peoples a chance to quiet title to their lands. The relevant land legislation in the Cordillera is summarized below:

> *Republic Act 3872* (Manahan Amendment, 1964), which provided for automatic acquisition of private, individual title by indigenous people who have for 30 years or more occupied lands of the public domain suitable for agricultural cultivation.
>
> *Administrative Order No. 11* (Bureau of Forestry, 1970), which provided that all forest concessions were to be subject to the private rights of the indigenous people occupying the concession at the time a license is issued.
>
> *Presidential Decree 410* (Ancestral Land Decree, 1974), which identified all agricultural lands occupied and cultivated by members of the indigenous peoples since 1964 as alienable and disposable, excluding those in Panay, Negros, Abra, Quezon, Benguet, and Camarines. However, it required them to acquire land occupancy certificates to be used in applications for free patents.

36. JUNE PRILL-BRETT, CULTURAL ISSUES, DEVELOPMENT AND COOPERATION IN THE PHILIPPINES (1994).

> *Presidential Decree 1529* (Property Registration Decree, 1978), which provided for the registration of land owned by those who by themselves or through their ancestors have been in open, continuous, exclusive, and recognized possession and occupation of all alienable and disposable lands of public domain under a bona fide claim of ownership since June 12, 1946, or those who have acquired such ownership through any other ways provided by law.
>
> *Presidential Decree 1998* (1985), which authorized the classification and/or reclassification of lands with a slope of 18% or more in the provinces of Cebu and Benguet as alienable and disposable provided certain conditions and criteria are met. These conditions are that the area is developed, planted with agricultural crops using effective erosion control practices like terracing, and that there are basic structures like schools and churches clearly existing.

In the Cordillera region (Northern Philippines), the state legislated policies that favored some of the indigenous populations. The indigenous population engaged in vegetable farming in Benguet province is a case in point. Local history shows that in the 1950s, there was a rush for land along the Halsema stretch because of the promising vegetable enterprise. Chinese businessmen-farmers would scramble for the lands in the area and soon would monopolize the vegetable farms in the area. In response, *Igorot* farmers organized themselves and rallied against Chinese dominance in the vegetable industry. This discontent reached Malacanang, compelling then Presidents Magsaysay and Macapagal to implement policies favoring the *Igorot* farmers and to provide indigenous peoples an opportunity to secure their lands. Among these policies include the following:

> *Executive Order 180* (Magsaysay Law, 1950), which directed the Bureau of Lands, Forestry and Soils, and the Mountain Province Development Authority to grant the *Igorots* the right to acquire titles for lands they had occupied and cultivated. July 4, 1945, provided that they completed survey and registration of these lands. This Executive Order also contained important directives giving some portions of Mt. Data National Park and the Central Cordillera Forest Reserve to landless *Igorot* farmers.
>
> *Republic Act 782*, which was later amended to Republic Act 3872, was enacted during the Macapagal regime. It granted land rights to landless *Igorot* vegetable farmers. The act was passed in response to the growing Chinese monopoly of the vegetable industry in Benguet. Similarly, President Ferdinand Marcos issued Executive Order 87, which

> granted rights to *Igorots* and required them to complete the technical survey of their landholdings.[37]
>
> The 1987 Constitution likewise contains some provisions regarding the recognition and promotion of "the rights of indigenous cultural communities within the framework of national unity and development" (Art. II, § 22) and the creation of autonomous regions in Muslim Mindanao and in the Cordilleras (Art. X, §§ 15-19).

A number of policies have also been developed by government agencies such as the Department of Environment and Natural Resources (DENR) and the Department of Agrarian Reform (DAR) in an attempt to provide land tenure to the indigenous people. Through the DENR, Administrative Order No. 2 (Departmental Administrative Order 2, commonly known as DAO2) Series of 1993, offers the issuance of Certificates of Land Claims (CALCs) and Certificates of Ancestral Domain Claims (CADCs) as a form of land tenure. The DAR also provides Certificates of land Ownership Award (CLOA) to selected provinces in the Cordillera.

DAO2 seeks to identify and delineate ancestral lands and ancestral domains, to qualify individuals, families, clans or entire indigenous communities for CADC or CALC, and to certify that those qualified have the right to occupy and utilize the land.[38] DAO2 differentiates between ancestral land and ancestral domain. Ancestral land includes residential lots, agricultural lands, and forests and may be claimed by individuals, families, or clans. Ancestral domain covers ancestral lands and natural resources therein, including nearby areas utilized by the indigenous peoples, and may be claimed by the entire community or tribe. Thus, while on one hand, the ancestral domain concept serves as a bulwark against the negative effects of the Regalian Doctrine upon indigenous peoples, the differentiation of ancestral land from ancestral domain on the other hand encourages disunity within tribes.

Filing a claim is tedious for the indigenous peoples, but it is not the bureaucratic procedure that makes DAO2 unacceptable. DAO2 is still based on the 1987 Constitution, which explicitly recognizes state ownership as previously described. State ownership means that the state has the sole power to dispense land rights. The implication of the power to dispense is the power to exclude. All Philippine laws are based on this distinct imprint of a colonial past.[39]

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37. Personal files of Purita Celo. Ms. Celo was one of the *Igorots* who, having met the requirement of occupying the land prior to July 4, 1945, claim to have availed themselves of this land instrument.

38. Dep't of Envtl. & Natural Res. Order No. 2 (1993).

39. GUAN & GUZMAN, *supra* note 13, at 8.

V. CONFLICTS OVER LAND AND NATURAL RESOURCES

A. State Laws v. Indigenous Peoples' Customary Laws

The indigenous peoples of the Philippines have been classified (by Maceda in 1975[40]) according to a typology based on concepts of land ownership and tenure among various indigenous peoples, with the indigenous peoples of the Cordillera considered the upland wet rice cultivators. These include the *Bontoks, Ifugaos, Kankanaey, Kalingas*, and the other tribes of the Cordillera. Acquisition of land, to these people, remains primarily a matter of occupying and then cultivating an area cleared of forest growth. These farmers then proceed to terrace the hillside and plant it with the preferred crop, rice, whenever water is available. The first occupant to build a terrace on a site is considered its owner. The acquisition of water rights is a necessary complement of land ownership because without water the terraces would be of little value.

Hillside clearings of land used for planting root crops and vegetables followed the same system in which the land belongs to the first cultivator. In this case, however, ownership is valid only until the land is reclaimed by forest growth. Once it reverts to this condition it becomes once more the property of the whole community and, as such, is free for the taking by the first person who clears it. If a piece of land is allowed to lie fallow, however, anybody intending to cultivate it will need the permission of the owner or the first cultivator.

A forest area may also be claimed by families as their own. This gives them the exclusive right to whatever firewood, lumber, and other forest products are derived from it. Land property may be alienated in any of the generally known ways: through sale, barter, mortgage, or inheritance. Reports indicate that outsiders find it difficult to make land purchases. When land is disposed of through inheritance, the best and most productive fields are reserved for the eldest son of the family. Among the upland cultivators, land is considered the most important item among their possessions, and the position of a person in his society will largely depend on the amount of productive land he can call his own.

B. Conflicts Between State and Customary Land Laws

The conflict between land laws imposed by the State and the customary land laws of indigenous peoples will be traced from pre-contact times until the present time. National land laws and indigenous laws exist simultaneously but independent of each other. And as a result of developing from very different historical origins and evolving from different modes of production, the two systems of land law often contradict each other.

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40. Marcelino N. Maceda, *A Survey of Landed Property Concepts and Practices Among the Marginal Agriculturists of the Philippines*, 2 PHILIPPINE QUARTERLY OF SCIENCE & CULTURE 5-20 (1975).

The conflict started with Spain. During its colonization of the Philippines in the 16th century, the concepts of land ownership, the idea of private property, the volume of agricultural production, and the way the different groups of people interacted changed drastically. The Spanish conquerors brought with them, among other things, their own world view of land and its system of ownership and use. They armed themselves with a feudal theory known as *Jura Regalia* – which later became the infamous Regalian Doctrine – and introduced this into the country through the Laws of the Indies and the Royal *Cedulas*.

The *Jura Regalia* did not automatically mean absolute ownership of the Philippine islands. But the colonists justified their appropriation of the islands to themselves and the Crown through this legal fiction, which stated that, "henceforth, by virtue of conquest, all lands in the archipelago belonged to the sovereign." This piece of fiction then became and has since remained the theoretical bedrock upon which Philippine land laws were based and which dealt a fatal blow to Philippine indigenous concepts of land rights and land tenure.[41]

During the American colonial period from 1898-1945, the American government used the same policy, requiring settlers on public lands to obtain deeds from the government. This reveals that the Americans understood the value of the Regalian doctrine as a legal basis for the state to hold property.

The colonial government introduced laws that reinforced the state's control over the public domain, justifying it by saying that there was no effective system of land registration during the Spanish period. The laws passed during that period include the following:

> *The Land Registration Act No. 496 of 1902*, which declared all lands subject to the Torrens system of formal registration of land title and empowered the State to issue to any legitimate claimant secure proof of title over a parcel of land. This system turned land into a commodity that could be traded by the exchange of a piece of paper.
>
> *The Philippine Commission Act No. 178 of 1903,* which ordered that all unregistered lands become part of the public domain, and that only the State had the authority to classify or exploit the same.
>
> *The Mining Law of 1905,* which gave the Americans the right to acquire public land for mining purposes.
>
> *The Public Land Acts of 1913, 1919 and 1925,* which opened Mindanao and all other fertile lands that the State considered unoccupied, unreserved, or otherwise unappropriated public lands to homesteaders and corporations, despite the fact that indigenous peoples were living in these lands.

41. Prill-Brett, *supra* note 24.

Aside from these laws, the ruling of the U.S. Supreme Court in the case of *Carino v. Insular Government* in 1909 protected the vested rights of indigenous cultural communities of the Philippines over ancestral domains that they have occupied since time immemorial. However, even if that holding is valid under present jurisprudence, the authority of the case is now questionable in light of recent legislation. Article XII of the Philippine Constitution of 1987 contains the provision that "all lands of the public domain . . . belong to the State." State laws have been enacted that have effectively extinguished the right of indigenous peoples to their lands such as Presidential Decree No. 705 (1975), also known as the Revised Forestry Code of 1975, which declares all lands 18% in slope or over are automatically considered as forestland and therefore not alienable and disposable unless released from the forest zone. Most of the indigenous peoples claiming rights to their lands are found within these areas. Also added to the 1987 Constitution were some provisions recognizing and promoting "the rights of indigenous cultural communities within the framework of national unity and development" (Article II, Sec. 22) and creating autonomous regions in Muslim Mindanao and in the Cordilleras (Article X, Secs. 15-19).

With all these laws on land and resources, "the indigenous peoples realized soon enough that, with respect to land at least, there were now the national written law – rooted in and carried over from the country's colonial experience – and the customary unwritten tribal law."[42] To their eternal consternation, they realized that while it was they who defied colonialism and retained their unwritten indigenous law systems, they would end up as disenfranchised cultural minorities. A conflict-ridden situation arose out of this historical accident. At the heart of the problem is the lack of congruence between the customary law and the national law on the ownership and use of land. The table in Appendix B contrasts differences between the two legal systems.

The newest law to protect the rights of the indigenous peoples in the Philippines is the Indigenous Peoples Rights Act of 1997 (IPRA). It was enacted in November 1997 and is considered a landmark in legislation for indigenous peoples. The IPRA is the first comprehensive law to recognize the rights of the indigenous peoples of the Philippines. It recognizes the indigenous peoples' rights to their ancestral lands and domain, and specifically sets forth the indigenous concept of ownership. The law recognizes that indigenous peoples' ancestral domain is community property that belongs to all generations. IPRA likewise recognizes the customs of indigenous peoples and their right to self-governance and empowerment. However, there have been many criticisms of IPRA, especially in terms of its conflict with other existing laws like the Philippine Mining Act of 1995.

The differences in the concepts of land ownership and management

42. Cerilo Rico S. Abelardo, Ancestral Domain Claims: Issues, Responses and Recommendations (1983) (unpublished thesis, Ateneo de Manila University, College of Law).

between the State and the indigenous peoples in the Philippines have led to a massive land grab of indigenous peoples' domain. Formal registration of land title has become a tool to convert communal ancestral lands into individually titled private lands, especially in town centers and cities in the Cordillera, and has led to the fragmentation of villages in the interior areas.

There are many stories told by indigenous communities of ancestral lands being fragmented and titled through fraud or legal circumvention by individuals and corporations familiar with the Torrens system. In addition, even without formal title to land, corporations are able to get licenses from the government to exploit the resources on ancestral lands for their own business interests, such as mining, logging, and agricultural plantations. In these cases, the state enforces national land laws to the detriment of those who have prior right to the land by ancient occupation under customary law. In the Cordillera, classic examples of land grabbing primarily involve multinational corporations appropriating large tracts of ancestral land from indigenous peoples in order to construct mines, hydroelectric plants, and other business projects.

One may argue that the indigenous peoples have as much a chance as non-indigenous peoples to apply for a Torrens title to their ancestral land. However, the process of land titling is very cumbersome, even for literate lowlanders. The procedure is so tedious that a tribal leader once complained, "applying for a title is like going through the eye of a needle . . . only the influential and moneyed go through but the less moneyed are denied [their applications]."[43]

This complaint is valid since the registration process incorrectly assumes that (1) all those interested in applying for titles are literate and able to grasp Western legal practices; (2) that newspapers are readily available even in the most isolated places of the country; and (3) that all applicants have the financial means and the time to go through such costly procedures. In addition, many indigenous peoples are not aware that there is such a thing as land titling.

The state's insistence upon formal land laws and policies from the colonial governments to the present administration reveals the longevity of the government's efforts to impose the Western system of land ownership upon all indigenous peoples. The state has made significant progress, especially given the benefit of collaboration from local government officials and some of the indigenous peoples themselves who are gaining from this process. These people include those educated in the lowlands, business people, local officials, and those who joined paramilitary troops to advance their own or their families' interests. This has happened because in the post-colonial period, "The central, national government, informed by a philosophy of national integration, has promulgated and attempted to implement land policies which have displaced and/or

43. WASING D. SACLA COMPILATION OF LAND LAWS – EFFECT ON INDIGENOUS OWNERSHIP/RIGHTS.

dispossessed the indigenous communities of their ancestral lands."[44]

There have been several cases in the Cordillera region that show the State's attempts to enforce the national land law system through, and on the pretext of development projects. Some of the more celebrated instances follow.

> *Granting Cellophil Resources Corporation of Timber and Pulpwood License Agreement No. 261 (under DENR) in the 1970s*. The agreement covered 99,625 hectares, and another 99,230 hectares covering the provinces of Abra, Kalinga-Apayao, Mountain Province, Ilocos Sur and Norte, which was granted to a sister company. This agreement, in effect, rendered the indigenous peoples of the Cordillera non-existent, for it declared these areas unoccupied. Moreover, these areas were theoretically inalienable because they lie within the Cordillera Forest Reservation.[45]
>
> *Granting the Chico River Basin Hydroelectrification Complex Project in the 1970s, despite its being aggressively opposed by the Kalingas and the Bontocs*. At the height of the indigenous peoples' resistance, President Marcos directed the Philippine Constabulary to arrest those who opposed the project. This led to the killing of Macliing Dulag, a prominent indigenous leader.[46]
>
> *Building the Ambuklao and Binga dams in the 1950s, which displaced 300 families in Benguet*. In the 1970s, the Magat dam construction in Isabela submerged 5,100 hectares and affected 304 families. Those displaced once more did not receive full payment for their lost land and were not relocated as promised. The construction of the Marcos Park and Highway in Benguet also displaced 81 *Ibaloy* families without fair compensation for their lands.

Implementing the National Integrated Protected Areas Program (NIPAP) in Mount Pulag in Benguet in the 1990s effectively deprived the *Ibaloy*, living in and around the mountain, of their right to utilize the natural resources that had traditionally sustained them. The NIPAS Act endeavors to map and zone areas to be preserved for ecological reasons. It limits the entry of indigenous peoples and

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44. Steven Rood & Athena Lydia Casambre, *State Policy, Indigenous Community Practice and Sustainability in the Cordillera, Northern Philippines*, *in* WORKING PAPER SERIES NO. 23 (Cordillera Studies Center ed., 1994).

45. Prill-Brett, *supra* note 24, at 18; James M. Balao, The Land Problem of the Cordillera National Minorities, Paper Presented at the First Multi-Sectoral Land Congress (Mar. 11-14, 1983).

46. Prill-Brett, *supra* note 24, at 16; Balao, *supra* note 45, at 15; Parpan-Pagusara, *supra* note 17, at 13.

their economic activities into areas such as watersheds and national parks. It effectively curtails the rights of indigenous peoples to utilize the natural resources that sustain them.

The Mining Act of 1995 facilitates the entry of large foreign and local mining corporations to enter the mineral-rich territories of indigenous peoples. It opens up the mining sector to 100% foreign control. Most of the exploration permits applications for Financial and Technical Assistance Agreements (FTAA) and Mineral Production Sharing Agreements (MPSA), and mining operations cover ancestral lands of the indigenous peoples. The law further entrenches continued mining operations in the Cordillera which hosts two of the biggest mining corporations, namely, Philex Mining Corporation and Lepanto Consolidated Mining Company. Mining companies already cover about 18,392 hectares, but existing and potential mining firms are still engaged in further exploration and expansion. Mining applications in the Cordillera cover roughly 1.4 million hectares, or more than three-fourths of the region's total land area.[47]

C. IPRA: Landmark Legislation?

The Indigenous Peoples' Rights Act (IPRA), or Republic Act 8371, is considered a landmark law. It is a comprehensive piece of legislation that includes not only the rights of indigenous peoples over their ancestral domain but also their rights to social justice and human rights, self-governance, and empowerment as well as cultural integrity.[48]

In the discussions below, key concepts like indigenous law, state law, and custom law will be used to frame the initial assessment of the IPRA. L.A. Gimenez' work[49] proved to be very useful here as the study focused on an *Ibaloy* community in Benguet. For Gimenez, customary law is something that is "evolved, defined, transformed or innovated by the people/community over time." In her study of Itogon, a mining community in the province of Benguet, Northern Philippines, she found that the people have their own definitions, descriptions and classification of lands and land rights. State Law, on the one hand, was defined by Wiber[50] as a "rule-centered approach" that is utilitarian and focused on self-interest. She further distinguished indigenous law and customary law as follows:

> "Indigenous law" refers "to local traditions which, although influenced by outside contacts throughout their

47. IBON, FACTS AND FIGURES (2000).

48. COALITION FOR INDIGENOUS PEOPLES' RIGHTS AND ANCESTRAL DOMAINS, GUIDE TO RA 8371 IPRA OF 1997 (ILO/BILANCE-Asia Department 1999).

49. LULA A. GIMENEZ, ON THE BASIS OF CUSTOM AND HISTORY LAND RESOURCE OWNERSHIP AND ACCESS RIGHTS AMONG THE IGOROT OF ITOGON MINING AREA 9-11 (Mining Communities & Development Center 1996).

50. *Id.* (citing MELANIE G. WIBER, POLITICS, PROPERTY AND LAW IN THE PHILIPPINE UPLANDS.).

> history, were until recently part of a 'totalitarian ideal' of their own."[51]
>
> "Customary law" refers "to the transformed normative orders which resulted in local communities when indigenous law and state law interacted over time."[52]

The Cordillera Peoples' Alliance, a regional alliance of indigenous people's organizations, holds a similar view – that indigenous law cannot be reconciled with national land law (state law). The two bodies of law originate from disparate contexts that involve different histories and views on land issues and land rights. This view is supported in Karl Gaspar's study of the Lumads in Mindanao when he states that "there is lack of congruence between customary law and national law on the ownership and use of land which results in a conflict-ridden situation."[53] He goes on to describe the many ways in which customary law and national law differ, including the concept of land ownership, the treatment of land acquisition, the right to use lands, mechanisms of forfeiture, land classification, alienation, and, finally, the philosophy and economic theory underlying each system of law.

As Gimenez would say, customary law therefore could incorporate elements of state law. In many cases though, customary law is equivalent to indigenous law, which is also equivalent to tradition.[54]

What is interesting to note is that the indigenous peoples, in an effort to secure and protect their lands and the resources therein, have learned to take the middle ground by using state law instruments but at the same time adhering to the customary law. The indigenous peoples' experiences with state laws have much to say about this growing phenomenon.

1. The IPRA Law

The IPRA echoes the "progressive" provisions of the 1987 Philippine Constitution as found in Section 2 of IPRA. The 1987 Constitution, Sec. 22, Article II recognizes and protects the rights of indigenous peoples; Section 4, Article XII protects the rights of indigenous peoples to their ancestral domains in order to ensure their economic, social, and cultural well-being. This section also recognizes customary laws governing property rights or relations and their validity in determining the ownership and extent of ancestral domains. Section 6, Article XIII and Section 17, Article XIV are also found in Section 2 of the IPRA.

IPRA likewise upholds the U.N. Draft Declaration on the Indigenous

51. *Id*. at 13.
52. *Id*.
53. *See* GASPAR, *supra* note 3, at 116.
54. GIMENEZ, *supra* note 49.

Peoples, which emphasizes the collective rights of indigenous peoples, as well as the International Labor Organization (ILO) Convention No. 169, or the Convention Concerning Indigenous and Tribal Peoples in Independent Countries.

Certain groups, however, hold a different view. The Cordillera Peoples' Alliance sees the IPRA as a law that was "hastily" signed by President Fidel Ramos in October 1997 just before his term was about to end. The Cordillera Peoples' Alliance would label this law and other land instruments as deceptive, because these devices still operate on the principles of the Regalian Doctrine imposed during the Spanish regime, which places ownership of public lands in the State. Because the doctrine has never been formally invalidated, it continues to deny indigenous peoples' rights to their ancestral lands and resources to this day.

2. Challenges and Opportunities of IPRA

In this section, the experiences of the municipality of Bakun in the province of Benguet with the IPRA law are highlighted and an initial assessment of how IPRA operates is offered. Bakun, in the northern province of Benguet, received the first land title from the state in July 2002 when the National Commission on Indigenous Peoples delivered a Certificate of Ancestral Domain Title (CADT) covering an area of 29,400 hectares. Earlier, Bakun had been issued its Ancestral Domain Claim from DENR on March 13, 1998 through the Department Administrative Order No. 2 (DAO2).

Bakun is home to the *Kankana-ey* ethno-linguistic group who are known to have their own *bantay-saguday* or indigenous ancestral domain management systems. The people are still governed by their own indigenous socio-political institutions that have sustained their lives and their cultural and political integrity through generations, independent of the state's national land laws. Being the first municipality to receive its own domain title, Bakun has been cited as a case of "good practice." The ILO-INDISCO support to the community-based Bakun Indigenous Tribal Organization (BITO), which initiated plans for sustainable development, in many ways, was instrumental to facilitating the processing of CADT approval.[55]

The story of Bakun illustrates an instance in which the indigenous people opted to work within the IPRA, the state's framework of development. Bakun has received much needed support and resources in order to fast track the awarding of domain title in time for the state-of-the-nation address of President Macapagal-Arroyo in 2002. This kind of support and political atmosphere is, of course, not available to other indigenous communities working for their ancestral domain titles.

But even on the eve of Bakun's acceptance of the CADT, it had to confront the operations of the Bakun Hydro Electric Development Corporation, an Aboitiz-owned Luzon Hydro Corporation. The free, prior, and informed consent

55. ROVILLOS & MORALES, *supra* note 6.

(FPIC) clause (as contained in Section 3, Part III of IPRA) was invoked – ironically, by the company. As one Bakun person would say, "We wanted to have the CADT . . . an assurance of land security . . . a shield from big companies . . . yet it seems corporations can not be stopped from entering our lands . . . ."[56] Previous experience like the planned expansion of mining explorations to Bakun by Lepanto Mining Company was replayed.

The people now are confused as to what and how much IPRA offers in terms of securing their lands and resources. This issue was documented a year ago by Maurice Malanes[57] and apparently remains a lingering problem to date. A case study conducted by Malanes documented that the major challenge to the Bago community in Bakun is finding a way to assert their rights under the "free, prior, and informed consent" provisions of IPRA. Even with IPRA, "large scale development projects are still being negotiated only within concerned government agencies [and] without legitimate community participation."[58] Closer analysis reveals the Philippine Mining Act of 1995 to be an even bigger problem on the horizon. This law gives a license to mining firms to continue to engage in mineral prospecting and continue to push the implementation of their mining plans even within ancestral domains.

The experience of Bakun's indigenous people is by no means isolated. After almost seven years of IPRA implementation, stories of conflict abound. In the Cordillera region alone, boundary disputes have increased. This can be attributed to long-standing conflicts over resources like water for irrigation and territorial delineation.[59] In the province of Abra, members of a clan who belong to the *Masadiit* tribe are in conflict with another clan of the same tribe over the delineation of their ancestral domains.

As IPRA stipulates "self-delineation" and customary laws to resolve conflicts, the factions are "recreating and re-telling their respective version of their customary laws."[60] Conflicts of the same nature have also been observed by the Cordillera Highland Agricultural Resources Management (CHARM) – a special project under the Department of Agriculture that facilitates the Cordillera land titling processes through its land tenure component – in the municipalities of Atok, Buguias, and Kibungan in the province of Benguet.[61]

These boundary disputes delay the issuance of the CADTs. In an attempt to address these conflicts, concerned groups came up with resolutions and

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56. Personal, informal discussions with *papangoan* (elders) Ampusungan, Bakun, Aug. 2, 2003.

57. MAURICE MALANES, POWER FROM THE MOUNTAINS, INDIGENOUS KNOWLEDGE SYSTEMS AND PRACTICES IN ANCESTRAL DOMAIN MANAGEMENT: THE EXPERIENCE OF THE KANKANAEY-BAGUO PEOPLE IN BAKUN, BENGUET PROVINCE, PHILIPPINES (2002).

58. *Id*. at 62.

59. *Id*.

60. ROVILLOS & MORALES, *supra* note 6, at 19.

61. Policy Dialogue Sponsored by CHARM, NCIP and CSC-UP (July 29, 2003).

forwarded these to appropriate bodies in the government.[62] To date, the conflict in the Masadiit domain of the province of Abra remains unresolved.[63] In other parts of Mt. Province, establishing ancestral boundary markers has reportedly remained stalled as the people are against the superimposition of these land laws.

The conflicts in the IPRA implementation felt most at the community level have not escaped the notice of the U.N. Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous Peoples in his mission to the country last December 2002. The rapporteur observed that while the Philippines is the only country in Asia that has a law on indigenous peoples, its "inadequate implementation is still an unfulfilled promise," particularly because it may conflict with other laws such as the Mining Act of 1995 and because IPRA itself contains provisions that do not favor the indigenous peoples entirely.[64] Even Marvic Leonen, a legal luminary on indigenous peoples' rights, who used to hold the view that the IPRA as a legal instrument can be used as a stepping stone towards a "more progressive level of political discourse,"[65] recently said that IPRA is a "heavily compromised law."[66] Reasons he provided are that the IPRA does not offer any fundamental solution to the conflict between customary and state law and that IPRA is an "analgesic . . . [which] directs attention away from the significant issues confronting indigenous peoples."[67] The Cordillera Peoples' Alliance's earlier fear that IPRA will bring more conflict than resolution to the chronic land problems in indigenous peoples' territories.

VI. CONCLUSION

Various governments from the colonial period to the present have endeavored to super-impose the Western system of land ownership on indigenous peoples through the implementation of various formal land laws and policies. Time and again, the state has ignored the indigenous populations' customary land laws, which have sustained them for centuries. Paradoxically, the contradiction between the state law and the customary law remains persistent. This is because the state law has the tendency of subsuming customary law, if not contradicting it outright. History has proven that the state's attempts to enforce its own legal system in the guise of "development" have displaced the indigenous peoples – the Cellophil Resource Corporation, the Chico dam, the Ambuklao and Binga dam

62. Regional Development Council-CAR, Res. CAR-049 (2003).

63. Ruth Sidchogan-Batani, Policy Dialogue Sponsored by CHARM, NCIP, and CSC-UP (Oct. 2003).

64. Victoria Tauli-Corpuz, *State of Affairs in the U.N.: Indigenous Peoples Lobbying and Advocacy in the International Arena,* 1 INDIGENOUS PERSPECTIVES 1 (1998).

65. ROVILLOS & MORALES, *supra* note 6 (citing Marvic Leonen).

66. RAYMUNDO D. ROVILLOS & VICTORIA TAULI-CORPUZ, SPECIAL RAPPORTUEUR ON INDIGENOUS PEOPLES RIGHTS: PHILIPPINE MISIÓN 5 (2002).

67. *Id*.

experiences are illustrative cases in point.

Some indigenous peoples who have seen and experienced the development policies of the state have somehow learned to work within this state-sponsored legal framework – and have been successful to a certain extent. For, indeed, the IPRA has worked for some indigenous people and non-indigenous people, especially those who are in power and who see advantages of the process.

However, for many indigenous peoples the state's development policies have not worked in their favor. In the first place, these laws have always been biased against indigenous concepts of ownership. Perhaps taking a step backward, to look once again at these state sponsored laws, to be able to discern what to reform in these legal texts, is but proper. The indigenous peoples have done more than enough to adjust or even to work within these laws. Now it is time to attempt another approach – to reform the legal texts to meet the needs of the indigenous peoples.

APPENDIX A

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APPENDIX B

CUSTOMARY LAW OF THE INDIGENOUS PEOPLES	PRESENT NATIONAL LAW
WHO MAY OWN THE LAND	
No one owns the land except the gods and spirits. Those who work the land are its mere stewards.	Any individual who holds a Torrens title may own alienable and disposable land. The State owns all other land.
TREATMENT OF THE LAND	
Communal use and ownership, based on the concept of communal property, are emphasized under customary law. This is especially so in terms of ownership by "a group of individuals or families who are related by blood or by marriage, or ownership by residents of the same locality who may not be related by blood or by marriage."[68] However, there is provision for individual ownership among indigenous peoples (e.g., Kalingas and other tribes in the Cordillera can consider a parcel of terraced land or residential lot as his own property). Individual ownership, however, is sanctioned despite the preference for communal ownership.	State law primarily favors an individual's private ownership through such devices as individual homesteads and patent titles. Civil code frowns upon co-ownership. "The term 'communal ownership' is distinct from the civil code concept of co-ownership and the corporation law's notion of corporate ownership."[69]

68. Abelardo, *supra* note 42, at 30.
69. *Id.*

CRITERIA FOR ACQUISITION AND FORFEITURE OF LAND USE RIGHTS

The right to use land is primarily a matter of actual use and occupancy. Persons assert control over land and acquire land-use rights by virtue of their membership in an indigenous community and the labor they expend clearing the land and continuing to cultivate it. When persons abandon the land, the village, through the leader or council of elders, has the right to allow someone else to cultivate the land. In some cases, a piece of land can be offered as a bride price or its ownership is transferred to a son or daughter who gets married. It is very rare (e.g., because of illness) that ownership of land is transferred to someone outside of the owner's clan or his village.

Land is acquired through perfection of a Torrens title. Thus, the title can be sold and bought, used for inheritance purposes, and can be used as collateral in the event of debt. When ownership is transferred from one person to another, use and control of land is also transferred to the new owner.

AUTHORITY TO DETERMINE ALIENABILITY AND CLASSIFY LAND USES

The indigenous peoples themselves, through their acknowledged leaders, or council of elders, or whoever is the recognized authority among various indigenous peoples in the Cordillera, possess the authority to declare which land is alienable and to classify land uses.

The State possesses sole authority to classify land uses and to determine the alienability of land. The Chief Executive holds the authority to classify and declassify land, although such power has been delegated to the Director of Environment and Natural Resources (used to be Forest Development) who recommends to the President which lands should be alienable.

PHILOSOPHICAL AND ECONOMIC PERSPECTIVE

The underlying philosophy of customary laws is communal rather than individual ownership. It is rooted in a way of life and has evolved out of a kinship-based and communal mode of reduction; it is inherently contradictory to the capitalist economic system. Land is not a mere commodity but a sacred and valuable possession. The basic policy is preservation, rather than alienation, of the property, for the property is seen as domain rather than just a piece of land.	The State's system of land ownership and registration is based upon a philosophy rooted in the Western capitalist mode of economic relationships. Land is treated as an individual commodity, consistent with the laissez-faire economic spirit. Land has to be made easily alienable in order to promote commerce and trade, as well as the circulation and accumulation of capital. This is enhanced by the system of registering land conveyances. Instead of domain, land is the object of registration. Legal structures and concepts are rooted in Western jurisprudence, and their colonial outgrowth primarily facilitated the exploitation of natural human resources.[70]

Source: GASPAR, *supra* note 3.

70. Owen J. Lynch, Withered Roots and Land Grabbers: A Survey Research on Upland Tenure and Displacement, Paper Presented at the National Conference on the Uplands (Apr. 1983).